

FREEDOM FROM TORTURE

An ABSOLUTE right that cannot be limited!

In law, torture is NEVER justified under any circumstances

Article 7 – Torture is prohibited under ICCPR

- ICCPR does not define torture
- The CAT is more specific about this
- Prohibits the sliding scale of bad treatment
- UN adopted definition in 1984
- NO JUSTIFICATION FOR TORTURE
- Article 2(2)
 - No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture
- The fact that it works is not legally relevant

Definition of Torture: Art 1 CAT

- Article 1 CAT:
 - ...torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions

ELEMENTS:

Severe pain and suffering

- Extremely high threshold
- Must be very severe
- Mental issues – rarely specify whether it is torture

Intention

- Must be intentionally infliction
- Intention to cause pain and suffering or an intention to commit the actual act? Latter would yield broader definition. It seems the relevant intention is to cause or at least be recklessly indifferent to cause pain and suffering
- No such thing as negligent torture
- SJ thinks this is a good idea – intentionally conduct is morally worse than unintentional
- Word starts to lose its meaning without this

Rojas v Colombia

- **FACTS:**
- Forcibly entered author's house through the roof – terrified and verbally abused family members
- A very terrifying house raid – WRONG house
- **HELD:** Breach of right to privacy AND breach of article 7

- But then stated- article 7 requires intent on part of actor as to possible effects of his act – no violation of article 7
- The police certainly intended to perform the impugned acts, but did not intend to perform them on the actual victims in this case!
- Vexed and problematic issue

○ Acts and omissions

- Does the word ‘act’ of torture preclude omissions? Deliberate withholding of food or medical attention constitute torture?
- Affirmative and negative conduct should suffice to constitute torture

○ For a purpose

- Beating out information
- Intimidating
- Coercing
- Discrimination
- Obtaining confession
- What if they’re sadist? Weird if they don’t come into this equation
- SJ thinks this is unnecessary – it’s a limit
- One thing it does do – it must be done for some sort of MALEVOLENT purpose
- What about someone who needs to cut off your leg to save life? A benevolent act so this is not torture

○ Public official involvement

- Spells out who the perpetrator should be – the STATE
- When such pain or suffering is inflicted /acquiescence of, etc. of public official!
- State must be involved in act of torture
- So can be involved by: [threshold]
 - Actually doing the torturing “by”
 - At their instigation
 - With consent
 - Acquiescence → important
- Tortured by maniac – then not torture?
- General rule is that the STATE must do what it can to PROTECT us from third parties
- Private maniac torturing you- not in itself a breach of HR
 - BUT Did the state do enough to stop it from happening? THIS IS THE QUESTION
- If reference to public official wasn’t there, there would still be a state nexus
 - Question is – does there need to be MORE state involvement than in ‘right to life’ ‘right to health’ -etc – States still need to protect these rights too
- From a stat interpretation POV – there is an explicit need for state involvement
- ACQUIESCENCE – Seems to mean that the state should know torture is happening, but doesn’t do much to stop it
 - Not too different from other HR?
- This definition has been criticised as being too narrow

- Male orientated definition of torture – common form of torture experienced by women is domestic violence
- If there is a woman suffering extreme circumstances in domestic violence → is this torture? Can you mount an argument? General answer: NO
- Doesn't take into account the more common torture suffered by women
 - The issue is the last two dot points: for a **purpose, public official involvement**
 - **Purpose?** Is his purpose discrimination? To confess to an affair? To confess to disobedience. Violence against women – extreme entrenched misogyny
 - **Public Official Involvement?** A private affair. But the CAT talk about family violence as part of torture. Is it with acquiescence? If they pass laws and don't enforce them? Failure to provide for shelters? Failure of general enforcement. Lack of legal support? Slash of legal aid – Is this acquiescence?
 - When a state has an issue with violence against women, it is often brought up with the state not doing enough
- **Public official involvement element not too different from general right of state to protect citizens**
- Acid attacks – in Pakistan – can probably come under consent
- ***Dzemajl et al v Yugoslavia***
 - **FACTS:**
 - Race riot prompted by rape of a girl – subsequent arrest of two Romani men – the crown called for the expulsion of the Roma from the settlement, threatening violence.
 - The Roma settlement was attacked – mob destroyed settlement
 - Police allegedly did nothing to stop – authors said it was torture or treatment contrary to article 16 of the CAT
 - **ISSUE:** Did the acts of violence occur with the 'consent or acquiescence' of the police?
 - **HELD:** CAT Committee agreed CAT had been violated – the complainants sufficiently demonstrated that the police, although they had been informed of the immediate risk that the complainants were facing and had been present at the scene of the events, DIDN'T TAKE ANY APPROPRIATE STEPS in order to protect the complainants – implying ACQUIESCENCE
 - Police inaction in the face of blatant torture constitutes acquiescence on the part of the State
 - The *Dzemajl* case indicates a State's failure to take reasonable steps to prevent torture (or cruel, inhuman and degrading treatment) constitutes acquiescence, giving rise to accountability under CAT
- ***Alzery v Sweden***
 - **FACTS:**
 - Author deported to Egypt from Sweden – clearly torture – handcuffed, chained, put in diapers, etc.
 - **HELD:**
 - Even though ill treatment arose from US agents, the hRC found Sweden was complicit in that treatment, in breach of article 7

- The treatment at the hands of foreign agents was “properly imputable” to the state party under the terms of the Covenant

▪ **GRV v Sweden**

- **FACTS:**
- Another deportation case- foreseeable danger of torture upon her return to Peru
- State party said that even if there is a risk of persecution, it is of local character – author could therefore secure her safety by moving within the country
- **HELD:**
- CAT in favour of state HERE → This issue of regraining from expelling a person who might risk pain or suffering falls OUTSIDE of the scope – even though they may have been capable of protecting author from torture by terrorist group, this does NOT mean they ‘acquiesced’ -the Peruvian govt taking reasonable steps to combat terrorist group
- INABILITY to protect a person is distinguishable from a FAILURE TO TAKE REASONABLE STEPS to protect that person
- IMPORTANT CASE TO DISTINGUISH FROM *Dzemajl*

▪ **Elmi v Australia (CAT)**

- **FACTS:**
- Author alleged proposed deportation to Somalia would breach article 3 – risked torture by Somalian militia groups
- State party argued those groups were non-state actors -so article 3 not engaged
- Concerned a forced return to a state where no central government actually existed
- **HELD:**
- HRC found in favour of author – acts of torture the author fears he would be subjected to in Somalia fall within the definition – the phrase ‘public officials or other persons acting in official capacity’ is met because the exercise of these groups are comparable to those normally exercised by legitimate governments
- From a humanitarian POV, the important issue is whether the person can be protected by the govt from torture, regardless of whether the threat comes from government agents or non-government groups

▪ **Wilson v Philippines**

- Violent behaviour against author by inmates and prison guards.
- HRC singled prison guards in breach of article 7 but not violent behaviour
- THIS CASE SHOWS that there is a need for the involvement of a public official, in the form of at least acquiescence, in order for particular conduct In breach of article 7 – but other cases do not show this

▪ **Chen v Netherlands**

- **FACTS:** Apparent Apprehension of torture by non-state groups upon return to china – person who was owed money by author’s deceased father
- **HELD:** Claim was inadmissible – they said these acts are attributed to a non-state actor – the author has not demonstrated

that the Chinese authorities are unwilling or unable to protect him from such private acts

- Claim was inadmissible not because fell out of scope of article 7, but because the author could not demonstrate that china would fail to protect her from the threat!

- **IT SEEMS THAT ICCPR IS A BETTER SOURCE OF PROTECTION FOR THOSE SEEKING TO AVOID TORTURE FROM PRIVATE ACTORS THAN THE CAT**

- **CAT General Comment 2:**

- Where state authorities or others acting in official capacity, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-state officials or private actors, and they fail to exercise due diligence to prevent, investigate, punish etc, then the state **bears the responsibility** – they are complicit in the torture.
- This is a more stricter standard of due diligence than that which generally applies under the ICCPR

- **Not lawful sanctions**

- Lack of attention in this element
- Arguably this undoes a lot of the first section
- **If you are suffering from this from something that has been sanctioned by the law, then it is not torture**
- Domestic or international law? Consensus is DOMESTIC LAW
- Don't exaggerate impact – states generally don't legalise torture – they can turn a blind eye
- Even if it did mean domestic law, not as important as it sounds – very few states authorise torture
- CAT is relatively silent on this
- This should not exempt imprisonment from being classified as 'torture' if the conditions
- Special Rapps say lawful means international law
- **IF SOMEONE IS IMPRISONED – CAN DISCUSS THIS NUANCE** -If international law, it does have some purpose → imprisonment can be intolerable – extreme mental pain and suffering – it satisfies every requirement
 - Imprisonment is allowed and presumed in HR (free from arbitrary detention meaning detention is OK)
- This sentence is a bit of an enigma – but in circumstance of imprisonment it is important

It is possible that HRC applies a more lenient standard of torture – such that torture or ill-treatment by a non-state actor is easier to bring within the scope of article 7 than it is to bring within the CAT – state parties have a **POSITIVE DUTY** to prohibit torture under general comment 20

CONVENTION AGAINST TORTURE:

- **Threshold is pretty high**
- We don't find out much from ICCPR – only know it is a breach of article 7. But the CAT does have certain consequences under torture – have to make findings

- The European convention article against torture – art 3
- CASE DEMONSTRATING HIGH THRESHOLD: **Ireland v UK**
 - **FACTS:**
 - Concerned treatment of terrorist subjects by British police
 - Difficult to prove torture techniques – mental torture
 - But here the facts were approved
 - Subjected to all 5 torture technique at once
 - Hooded
 - White noise
 - Beaten
 - Death threats
 - Wall standing
 - **HELD:**
 - European commission found this was torture (EC was abolished now though)
 - On appeal – European court found this was NOT torture – but inhuman and degrading treatment
- European court made its first decision of torture in 1990s against TURKEY
 - Rape by the guards in prison
 - Beating etc
 - Inserting things in peoples bodies
- Nauru and Manus
 - Mental issues from this?
 - Definite examples of pain being so bad – but SJ thinks most is not
 - Legal standard of torture is a lot higher than social standard (like ‘hate’ speech)
 - Self immolation as a result = probably shows very terrible conditions

Findings of torture:

- **Dragan Dimitrijevic v Serbia**
 - **FACTS:**
 - The CATs first finding of a violation
 - Complainant arrested in connection with investigation of a crime
 - Beat up by police, hand cuffed, etc.
 - **HELD:**
 - The treatment was torture under article 1, per the CAT
 - Prior to this case, the CAT had been timid in making findings of violations.
 - No longer timid

IF NOT TORTURE, DOES IT FALL UNDER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT?

ARTICLE 7 ICCPR – TORTURE OR CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

- No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.
- An ABSOLUTE RIGHT – no restrictions are permitted. It is also NON-DEROGABLE
- Torture is not only prohibited. Ill Treatment is also prohibited under Article 16 CAT, Article 7 ICCPR, LOAC (IHL)

- Torture
- Cruel and inhuman treatment/punishment
- Degrading treatment/punishment
 - These can be perpetrated unintentionally
 - Purpose test is a lot looser
- Article 7 ICCPR extends to CIDT
- HRC doesn't often specify what 'level' of torture has occurred
- Whether waterboarding is torture is irrelevant, because it definitely is ill treatment-cruel/ degrading etc
- Potentially a more lenient standard in this respect – torture or ill-treatment easier to bring within the scope of article 7
- **GENERAL COMMENT 20:** Aim is to protect both the dignity and the physical and mental integrity of the individual.
- No specific definitions – THE DISTINCTIONS BETWEEN THE DIFFERENT KINDS OF PUNISHMENT/TREATMENT – depend on nature, purpose and severity of the treatment applied.
- General Comment 20: the **aim of the provisions of art 7** of ICCPR is to protect both the dignity and the physical and mental integrity of the individual
- It is the duty of the state party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7 – whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity...
- **The prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim**

- ***Vuolanne v Finland***

- **FACTS:**
- Vuolanne was held in military detention in a small cell for ten days – for disciplinary reasons
- He claimed his detention breached article 7
- Locked in a cell with tiny window- only taken out for half an hour and to eat
- Basically in solitary confinement
- **HELD:**
- HRC found in favour of State Party on article 7 issue
- What constitutes inhuman or degrading treatment **depends on all the circumstances of the case**
 - Duration and manner of treatment
 - Its physical or mental effects as well as the sex, age and state of health of victim
- No severe pain or suffering, nor at the instigation of a public official, the solitary confinement did not have any adverse physical or mental effects on him
- No humiliation or that dignity impaired
- **HRC expresses the view that for punishment to be degrading, the humiliation or debasement involved must exceed a PARTICULAR LEVEL and must, in any event, entail other elements beyond the mere fact of deprivation of liberty!!**
- This case highlights – whether it is article 7 treatment is in part a subjective evaluation
 - Victims age

- Mental health – can aggravate the effect of certain treatment so as to bring that treatment within article 7
- HRC notes that ‘degrading treatment’ must entail more than ‘the mere deprivation of liberty’
 - SJ THINKS THIS GOES TO FAR – SEE 9.31 – would the mere detention of an extremely claustrophobic person, for no other reason other than to break his or her will, breach article 7
- **Art 16 OF THE CAT-** Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.
 - No specific definitions of ‘cruel’, ‘inhuman’ or ‘degrading treatment’ have emerged under ICCPR or CAT
 - The requirements of severity, intention and purpose are **presumable applied more leniently in determining whether such treatment has occurred**
 - **PERHAPS THIS CAN HAPPEN NEGLIGENTLY!**
 - Sometimes even actions which end up causing a person’s death may not amount to torture: *Sonko v Spain*
- *Keremedcheiv v Bulgaria*
 - **FACTS:**
 - Author worked in ski resort
 - He fell asleep in lobby, woken up to someone kicking him
 - Two POs arrived and shouted at the complainants and handcuffed him
 - Kicked and beaten
 - Woke up in patrol car, threatened with being shot
 - Blood in his urine
 - **HELD:**
 - CAT found breach of article 16
 - While recognising physical pain and suffering may arise from a lawful arrest of a non-cooperative individual, the Committee considers that the use of force should be proportionate
 - Cruel, inhuman or degrading treatment, NOT torture
- *Giri v Nepal*
 - **FACTS:**
 - Author alleged he suffered from following treatment after he had been in a town where authorities chased an alleged Maoist activist
 - Blindfolded, kicked unconscious, put in moving truck, filthy smell, no water, kept him handcuffed while eating for months
 - For 13 months this continued
 - **HELD:**
 - HRC found violation of article 7 – recalls its General Comment no 20: it did not consider it necessary to **draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment**
- Since this case, HRC been more robust in making specific findings of ‘torture’ under article 7
- *Agiza v Sweden*
 - **FACTS:**
 - Rendition case to Egypt